CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 167.

IN RE JAMES B. WOOD AND JETHRO P. HENDERSON, PETITIONERS.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED DECEMBER 7, 1906.

(20,482.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 5, 1907.

1 United States Circuit Court of Appeals, Eighth Circuit.

In re JAMES B. WOOD and JETHRO P. HENDERSON, Petitioners.

Upon Certificate to the Supreme Court of the United States.

The United States Circuit Court of Appeals for the Eighth Circuit, sitting at the City of St. Paul, Minnesota, on the sixteenth day of November, A. D. 1905, certifies that the record on file in the suit above entitled, which is pending in this court upon a petition to superintend and review in matter of law a proceeding, order and judgment of the United States District Court for the District of Colorado sitting in bankruptcy, discloses the following facts:

On January 30th, 1904, one R. H. Williams was adjudged a bankrupt in said District Court of Colorado. In due time a Trustee was appointed, and the case was referred to George M. Irwin, Referee in Bankruptcy.

On the 17th day of May, 1905, the Referee in Bankruptcy made an order, reciting that the Trustee in Bankruptcy had petitioned the court representing that R. H. Williams, the bankrupt, in contemplation of the filing of the petition in bankruptcy against him, and within four months of the filing thereof, did pay to James B. Wood and Jethro P. Henderson, at the City of Hot Springs, in the County of Garland, State of Arkansas, the sum of $5,000 in cash, one certificate of deposit issued by the Security Bank of Hot Springs, Arkansas, for $3,000, and one certificate of deposit issued by the Arkansas National Bank of Hot Springs, Arkansas, for the sum of $1,795. The Trustee represented in said petition that said money and property were transferred to the said James B. Wood and Jethro P. Henderson for professional services as attorneys and counsellors at law to be rendered to the said R. H. Williams thereafter. The Referee further recited that by said petition it appeared that

2 said money and property were transferred to said Wood and Henderson by said Williams in contemplation of the filing of the petition in bankruptcy against him, and within four months of the filing thereof, for legal services to be rendered to him thereafter by said Wood and Henderson. He thereupon ordered that said James B. Wood and Jethro P. Henderson be, and they were, cited to "appear before this court at his office in the Hagerman Building, in the City of Colorado Springs, in the County of El Paso, and the State of Colorado, on the 20th day of June, 1905, at 2 o'clock in the afternoon, and show cause, if any they have, why an order should not be entered by this Referee determining and adjudging the reasonable value of the services rendered and contemplated to be rendered by the said James B. Wood and Jethro P. Henderson, as attorneys and counselors, for the said R. H. Williams. And the said James B. Wood and Jethro P. Henderson are further notified that in default of their appearance at the time and place above designated, this Referee will hear and determine the said matter on the evidence

presented by the said Trustee." It was further ordered that a copy of this citation, together with a copy of the petition filed by said Trustee in Bankruptcy, be served on said Wood and Henderson at the City of Hot Springs, Garland County, Arkansas, at least twenty days before the date set for said hearing, and that proof of such service be filed before the hearing thereof.

Afterwards the Referee in Bankruptcy, at a court of bankruptcy held at the place aforesaid, on the 1st day of August, 1905, in his finding and judgment on the petition of the Trustee aforesaid, after setting out the matter of the application and petition, recited:

"It appearing to the court from the evidence that a copy of this application, together with a copy of the order to show cause issued thereon returnable on the twentieth day of June, A. D. 1905, was duly served on said J. B. Wood and Jethro P. Henderson on the twenty-sixth day of May, 1905; and that the said J. B. Wood and J. P. Henderson, not having appeared on the said twentieth day of June, 1905, herein or shown to this court any cause why this court should not proceed to re-examine the said transaction. And it further appearing to this court that the matter of the said
3 hearing has been duly continued from the said twentieth day of June until this first day of August, 1905, and that due notice of such continuance has been served upon the said J. B. Wood and Jethro P. Henderson and that the said J. B. Wood and Jethro P. Henderson are fully advised that this hearing would be duly had on this day; and the said J. B. Wood and Jethro P. Henderson not having shown cause against the said application and the court having heard the evidence on the part of the said trustee in support of the said application and the arguments of counsel thereon, and the court being fully advised as to all matters of law and fact arising herein, the court doth find and adjudge that the said R. H. Williams, in contemplation of the filing of a petition in bankruptcy against him did, on the fifth day of December, 1902, transfer to said J. B. Wood and Jethro P. Henderson, attorneys at law, for services to be rendered, the sum of $5,000 lawful money of the United States, and one certificate of deposit for the sum of $3,000 issued by the Security Bank of Hot Springs, Arkansas, to the said R. H. Williams, and one certificate of deposit issued by the Arkansas National Bank of Hot Springs, Arkansas, to R. H. Williams for the sum of $1,795, the said two certificates of deposits having since been collected by the said J. B. Wood and Jethro P. Henderson. And the court doth find on re-examination of the said transaction that the sum of $800 is reasonable compensation for the services rendered the said bankrupt under the terms of the transaction by which said money and property *was* transferred to the said J. B. Wood and Jethro P. Henderson, and doth find and adjudge that the said transaction is valid to that extent only, which the court determines and adjudges to be the reasonable value for said services.

"It is, therefore, ordered, adjudged and decreed that the said transaction is void, except as to the sum of $800.00 so adjudged to be reasonable value for said services, and that the Trustee herein

proceed to recover the excess, to-wit, the sum of $8,995.00 from the said J. B. Wood and Jethro P. Henderson."

After this judgment was rendered the said Wood and Henderson appeared before the Referee for the sole purpose of challenging his jurisdiction to make the foregoing orders, and presented to him a petition alleging that he was without jurisdiction to make the orders aforesaid because neither the parties nor the subject matter was within the jurisdiction of the District Court of Colorado; and prayed that he would certify the proceedings had before him to the District Court in order that the same might be reviewed by the District Court. The Referee refusing to so certify the question, said Wood and Henderson presented to the District Court of Colorado a petition for an order on the Referee to make the necessary certificate. This petition was granted and an order made upon the Referee to certify the cause to that court. The order was complied with and the cause so duly certified. In the District Court the said Wood and Henderson renewed their objection to the jurisdiction of the District
4 Court over them and the subject matter and to the jurisdiction of its referee to render the judgment complained of. After hearing upon this certificate and the record in the case the District Court adjudged that the rulings and order of the Referee should be in all things confirmed.

Thereafter said Wood and Henderson filed their petition in this court for a revision in matter of law of these proceedings and for a review of the decision of the District Court of Colorado, and questioned the jurisdiction of that court and its Referee to render the judgment aforesaid. The petition for review herein alleges that at all times aforesaid, and at the time of making said order and the service thereof the petitioners were and are citizens and residents of the State of Arkansas, and that they had not at any time been or appeared within the jurisdiction of the District Court of the State of Colorado except to file their petition for review for the purpose of objecting to the jurisdiction of said Referee; that the service of notice of the proceedings before the Referee was made upon them at Hot Springs, Garland County, State of Arkansas, outside of the jurisdiction of the District Court of the United States for the District of Colorado; that the subject matter sought to be affected by the proceeding was and is certain transactions and certain moneys or properties which took place or were transferred wholly within the State of Arkansas, at the City of Hot Springs.

And the Circuit Court of Appeals of the Eighth Circuit in view of the importance of the questions of law and practice involved certifies that the following questions of law are presented by the petition for revision filed in this court in this case; that their decision is indispensable to a determination of this case, and that to the end that this court may properly decide the issue of law presented it desires the instruction of the Supreme Court of the United States upon the following questions:

1. Has a District Court of the United States sitting in bankruptcy in which the proceedings in bankruptcy are pending, or its
5 Referee, jurisdiction under Section 60*d* of the Bankrupt Act to re-examine, on petition of the trustee in bankruptcy, the

validity of the payment of money or the transfer of property by the bankrupt, made in contemplation of the filing of a petition by or against him in bankruptcy, to an attorney or counsellor at law for services to be rendered to him by such attorney or counsellor, and to ascertain and adjudge the extent of the reasonable amount to be allowed for such services and to direct that the excess may be recovered by the trustee for the benefit of the estate, in the instance where such attorney or counsellor at the time of receiving such payment or property and at the time of the proceedings in question was a non-resident of the State, or of the District, in which the bankrupt court instituting such inquiry is located, and where the money or property was so paid to, and is held by, such attorney or counsellor outside of the District in which such court of bankruptcy sits and the order to show cause, citation, or notice of the proposed hearing is served upon him without, and not within the District in which such court of bankruptcy sits?

2. If a District Court sitting in bankruptcy has this jurisdiction, may it exercise it by means of an order and citation to show cause duly served on the attorney or counsellor outside of the District of the court of Bankruptcy, such attorney or counsellor being non-resident of the District in which the proceedings in bankruptcy are pending?

3. May a plenary suit instituted by the trustee in bankruptcy against such attorney or counsellor in the District Court where the estate in bankruptcy is being administered be maintained upon service of process upon the attorney or counsellor, who is a non-resident of the District, outside of that District?

WALTER H. SANBORN,
Circuit Judge.
WILLIS VAN DEVANTER,
Circuit Judge.
JNO. F. PHILIPS, *District Judge.*

Filed Nov. 16, 1906.
JOHN D. JORDAN, *Clerk.*

6 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing Certificate *in re* James B. Wood and Jethro P. Henderson, Petitioners, No. 71 Original, September Term, A. D. 1906, was duly filed and entered of record in my office by order of said Court, and as directed by said Court, the said Certificate is by me transmitted to the Supreme Court of the United States for its action thereon.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said Court at office in the City of St. Paul, Minnesota, this sixteenth day of November, A. D. 1906.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals,
Eighth Circuit.

[Endorsed:] U. S. Circuit Court of Appeals, Eighth Circuit. September Term, 1906. No. 71, Original. *In re* James B. Wood and Jethro P. Henderson, Petitioners. Certificate of Questions to the Supreme Court of the United States. Filed Nov. 16, 1906. John D. Jordan, Clerk.

Endorsed on cover: File No. 20,482. U. S. circuit court appeals, 8th circuit. Term No. 167. *In re* James B. Wood and Jethro P. Henderson, petitioners. (Certificate.) Filed December 7th, 1906. File No. 20,482.

In the Supreme Court of the United States.

October Term, 1907.

No. 167.

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IN RE JAMES B. WOOD AND JETHRO P. HENDERSON, PETITIONERS.

On a certificate from the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR PETITIONERS.

W. SCOTT BICKSLER,
EDMON G. BENNETT,
Attorneys for Petitioners.

GEORGE L. NYE,
of Counsel.

(20,482.)

THE SMITH-BROOKS [redacted] TYPES, DENVER

In the Supreme Court of the United States.

October Term, 1907.

No. 167

IN RE JAMES B. WOOD AND JETHRO P. HENDERSON, PETITIONERS.

On a certificate from the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR PETITIONERS.

ARGUMENT.

The record in the Circuit Court of Appeals for the Eighth Circuit discloses, in addition to the facts stated by that court in its certificate, that the petitioners, Wood & Henderson, have never appeared in the matter of R. H. Williams, bankrupt, in the District Court in Colorado, and that they are not members of the bar of that court. We think, therefore,

that the first question stated by the Circuit Court of Appeals might properly be amended to read as follows, the italics being ours:

FIRST QUESTION.

"Has a District Court of the United States sitting in bankruptcy, in which the proceedings in bankruptcy are pending, or its referee, jurisdiction under section 60 d of the bankrupt act to re-examine, on petition of the trustee in bankruptcy, the validity of the payment of money or the transfer of property by the bankrupt, made in contemplation of the filing of a petition by or against him in bankruptcy, to an attorney or counsellor at law for services to be rendered to him by such attorney or counsellor, and to ascertain and adjudge the extent of the reasonable amount to be allowed for such services and to direct that the excess may be recovered by the trustee for the benefit of the estate, in the instance where such attorney or counsellor, at the time of receiving such payment or property, and at the time of the proceedings in question, was a non-resident of the state, or of the district in which the bankrupt court instituting such inquiry is located, *is not an attorney of record in the proceeding, nor a member of the bar of that court*, and where the money or property was so paid to, and is held by, such attorney or counsellor outside of the district in which such court of bankruptcy sits, and the order

> to show cause, citation or notice of the proposed hearing is served upon him without and not within the district in which such court of bankruptcy sits?"

This change, although entirely proper, and disclosed by the record, as already indicated, is not really essential to a discussion of the questions certified by the Circuit Court of Appeals, because the first question is not really changed by the amendment suggested, but the position of the petitioners is merely made a little stronger.

At the outset of this argument, and in order that the position of petitioners may be clearly defined before this court, we unhesitatingly answer "*no*" to each of the three questions propounded by the Circuit Court of Appeals.

The proceedings by the trustee in connection with this matter, from their inception, have been based squarely upon subdivision d of section 60, and in the provisions of that subdivision, and that alone, the trustee finds his authority. We think, however, that there are other provisions of the bankruptcy law which necessarily have a bearing and effect upon the determination of the questions under consideration. To such sections we shall refer as they take their place in the discussion which follows:

Coming now to the first question propounded by the Circuit Court of Appeals; this is an original question, in the sense that, so far as we have been able to determine, by a careful and thorough search of the authorities, it has never been *directly* decided.

A few cases have considered section 60, subdivision d, but have not reached the question here. We notice them briefly.

In the case, In re Lewin, 103 Fed., 850, the attorneys proceeded against were attorneys of record for the bankrupt. The attorneys and the referee lived in the same village, and were officers of the same court. In the case of Pratt vs. Bothe, 130 Fed., 670, the attorney, the payment to whom was questioned under subdivision d of section 60, instituted the proceedings himself, and invoked the jurisdiction of the court, by filing with the referee his petition for the allowance of the claim, which was there considered. In the case, In re Habegger, 139 Fed., 123, the attorney, the payment to whom was re-examined under the authority of section 60 d, was the attorney for the bankrupt, and an officer of the court which made the re-examination.

A court of bankruptcy is a court of limited and special jurisdiction.

Hull vs. Burr, 153 Fed., 945.

This is not only elementary, but it is made peculiarly apparent by a careful examination of the act creating courts of bankruptcy, with the amendments thereto, because in the act and the amendments the Congress of the United States not only fixes the general jurisdiction in bankruptcy matters, but goes to the extent of carefully defining property jurisdiction and jurisdiction over persons. See sections 2, 23, 60, 67 and 70 of the bankruptcy act of 1898, with amendments.

Section 2 of the bankruptcy act provides:

> "That courts of bankruptcy, as hereinbefore defined, are hereby invested within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, to * * * (subdivision 7) cause the assets of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, *except as herein otherwise provided.*

The exception appearing in subdivision 7 has been held over and over again to refer to section 23 of the act; and in determining the jurisdiction of a bankruptcy court, section 23 has been construed to and must invariably have a controlling effect.

> Hull vs. Burr, 18 A. B. R., 541; 153 Fed., 945.
>
> Bardes vs. Hawarden Bank, 178 U. S., 524.

The decision in the case of Bardes vs. Hawarden Bank, 178 U. S., 524, clearly and conclusively denied the jurisdiction of bankruptcy courts in plenary suits, except by the consent of the proposed defendant. The decision in that case is founded upon section 23 of the original act, and is based upon fundamental principles. It is authority upon the question of jurisdiction in all instances, except where the case made falls clearly within the exceptions of the amendatory act of 1903.

It is well to bear in mind that section 60 of the bankrupt act deals with "*preferred creditors;*" that

such definitive words are incorporated in and made a part of the section (see Bardes vs. Bank, 178 U. S., 524, 534), and that the portion of the act relied upon by the trustee is subdivision d of this same section.

In section 60 Congress was dealing with *creditors,* and *preferred creditors* at that; creditors who had reasonable cause to believe that, by a payment to them, it was intended that they should receive a greater percentage of their debt than other creditors in the same class; creditors who after a preference gave further credit to the bankrupt and creditors preferred by the law itself.

Section 64 b, clause 3, establishes a priority of payment for the fees of the attorney "to the bankrupt in involuntary cases while performing the duties herein prescribed."

In the case In re Habegger, 139 Fed., 123, it was contended by the petitioning trustee that:

> "The legal services provided for in the act, and by section 64 b of the act awarded priority of payment over the demands of other creditors against the estate, or which are permitted to stand as a valid preference under the provisions of section 60 d of the act, when paid by the debtor before contemplated bankruptcy, are such services only as tend to conserve the estate to the creditors, bring it before the court for adjudication and distribution, and other like legal services rendered to the creditors or bankrupt, required or necessary to be done under the terms of the act in carrying out and rendering effective its purpose."

And in the decision by the Circuit Court of Appeals for the Eighth circuit, in that case, the court, speaking through Mr. Justice Pollock, say:

> "From a consideration of the entire act, having in mind the dominant object and purpose is to protect the estate of failing debtors and to distribute it among creditors *pro rata* in proportion to their provable demands, to guard it from preferred creditors and fraudulent grantees, and in the end to provide for the discharge of the honest debtor, we are inclined to agree with the contention made by the trustee, notwithstanding the broad, general language of section 60 d, and for this reason. From an examination of the entire act it will be seen no other or different provision is made respecting the allowance or payment of the general obligations of bankrupts to their attorneys than is made for the payment of other debts of the bankrupt. The method provided by the act for the preservation of the bankrupt estate, the ascertainment of the amount of valid claims against the bankrupt, the value of the assets, the extent and priority of liens thereon, the conversion of the estate into money and its disbursement amongst creditors, preferred and general, the granting of a discharge to the bankrupt, and all other proceedings thereunder, are, in accordance with the provisions of the act, transacted in the bankruptcy court. Of nenessity, such proceedings are conducted in most cases by attorneys employed by the

bankrupt in voluntary cases, or by the creditors in involuntary cases. It is just and equitable such attorneys should be compensated for their services rendered in this behalf out of the assets of the estate, because of the fact that by the filing of a petition in bankruptcy the non-exempt property passes into the control of the court, leaving the bankrupt without means of payment. Hence, the clause of section 64 b, above quoted, in making provision for the payment of debts which have priority, and which must be paid in full before distribution of the estate to the general creditors, makes provision for the compensation of attorneys as therein specified in cases where no contract has been theretofore made with the bankrupt and payment made in advance of the bankruptcy proceedings.

"Again, the act is framed in recognition of the well-known fact that a debtor in contemplation of insolvency and consequent bankruptcy proceedings may be importuned, harassed and annoyed by his creditors seeking to gain an advantage over other creditors by way of preference, fraudulent conveyances, and the like; and in such extremity the bankrupt needs the advice and assistance of counsel to conserve the estate for the benefit of all creditors against spoliation and dissipation, and in the preparation of the petition, schedules and the like papers to confer jurisdiction on the court to take charge of the estate, and, in order to obtain such legal

services in contemplation of bankruptcy proceedings, may make contracts, and will make present payments of money or transfers of property to obtain such services and make payment thereof, which executory contracts, being made by one insolvent and in contemplation of bankruptcy proceedings, would under other provisions of the act be voidable as a preference, unless protected by section 60 d. Therefore such payments of money or transfers of property to an attorney by one contemplating bankruptcy as tend to conserve the estate and bring it before the bankruptcy court for settlement, or other services required by the terms of the bankruptcy act to be performed by the bankrupt, are made valid as a preference under that section, to the extent they are found upon examination to be reasonable and equitable; such claims being in principle entitled to equitable priority, as are claims for services performed or property furnished in the preservation and betterment of an estate controlled and administered by a court of equity. All other claims for legal services are allowable only as a general claim against the estate of the bankrupt in the hands of the trustee. In view of the oft-repeated declarations of courts as to the object and purpose of the national bankruptcy act, as to the advantages accruing to creditors and the debtor, as well by an honest, conservative and expeditious preservation and administration of the estate according to its letter and spirit,

> and as to the many mischiefs sought to be guarded against by its enactment and enforcement, the construction here given section 60 d seems to us to be most in consonance with the purpose sought to be accomplished by the act, as declared by the courts, and as gathered from the several sections of the act construed as a whole, and also to be in harmony with the better reasoned cases bearing upon the subject, as will be seen by reference thereto." (15 Am. B. R., page 203.)

So it is our contention here that sections 60 d and 64 b, clause 3, are to be construed together, and that when so construed the charges to be "approved" under the one or *allowed* under the other are the same.

In re Kross, 96 Fed., 816.

There can be no question but that Congress was dealing with "*parties to the proceeding*" in enacting section 60.

The act makes no provision whatever for the payment of general claims of attorneys in any way except as an ordinary debt of the bankrupt. It is only for services rendered in aid of the bankruptcy proceeding that attorneys are preferred creditors under section 60 to the extent of a reasonable fee, or entitled to priority of payment of such fee under section 64. The reasoning in the case of In Re Habegger, 139 Fed., 123, makes this doubly plain.

An adjudication in bankruptcy is a proceeding *in rem* affecting primarily the estate of the bankrupt, and, secondarily, those interested in it; and all par-

ties having an interest in the *res* are parties to the proceeding. Such parties include the bankrupt, the trustee and all creditors.

Carter vs. Hobbs, 92 Fed., 594.

Southern Loan & Trust Co. vs. Benbow, 3 Am. B. R., 10, 35; —— Fed., ——.

Considering the attorney for the bankrupt rendering services in aid of the bankruptcy proceeding as entitled to priority of payment under section 64 b, if the entire estate was surrendered by the bankrupt, the Congress, of course, included him as a preferred creditor under section 60 d, in the event that he had been so preferred, as matter of fact, by the bankrupt out of the estate before its surrender; and considering that, in rendering services in aid of bankruptcy, the attorney would be before the bar of the bankruptcy court by actual appearance in the proceedings, if not theretofore an officer of such court by virtue of his admission to practice before it, and, hence, directly amenable to its orders and punishable by contempt proceedings for any violation thereof, Congress included in subdivision d of section 60, a power, to the court administering the estate, to pass on the reasonableness of the amount already received by such attorney, which is identical with the power contained in section 64 b, clause 3, in the words "one reasonable attorney's fee, for professional services actually rendered, as the court may allow."

It thus seems clear that the re-examination authorized by section 60 d refers only to the prior payment of *fees* which might later be allowed in whole or in part under section 64 b.

But summary process has been resorted to here for the purpose of bringing from outside the territorial limits of the court, individuals who could not claim fees under section 64 b, for the purpose of trying their title to property in their possession, claimed and denied as a part of the bankrupt estate.

Summary process to settle disputed rights of property is not favored. "This court has steadily set its face against" any extension or enlargement of the well recognized instances for the use of such process.

Eyster vs. Gaff, 91 U. S., 521, 525.
Bardes vs. Bank, 178 U. S., 524, 534.

In the case at bar, Wood & Henderson are not parties to the proceedings in bankruptcy, either as creditors or attorneys of record, they are not officers of the court before which the case is pending, the money or property was paid or transferred to and is held by them in Arkansas outside the district in which the court of bankruptcy sits, and the notice or order to show cause was served on them outside the district.

As was well said by Mr. Justice Sanborn, In Re Rosser, 101 Fed., 567:

> "The basic principle of English jurisprudence is that no man shall be deprived of life, liberty or property without due process of law, without a course of legal proceedings according to those rules and forms which have been established for the protection of private rights. Such a course must be appropriate to the case and just to the party affected."

The exception in clause 7, section 2, of the bankruptcy act, refers to section 23 (Bardes vs. Hawarden Bank, 178 U. S., 524), and to the extent only that section 23 has been modified by the amendatory act of 1903 has the law of that case been changed.

The general provision for jurisdiction in section 2 is that, "courts of bankruptcy are hereby invested, *within their respective territorial limits* as now established or as they may be hereinafter changed, etc."

The territorial limits of a bankruptcy court are the territorial limits of the United States District Court of the district in which it sits.

It is true that an adjudication in bankruptcy operates to place the property of the bankrupt in the custody of the court making the adjudication, and that such court "collects, marshals, administers, determines priorities of the parties and directs the distribution of the assets." In Re Granite City Bank, 137 Fed., 819. But this rule applies only to "*property of the bankrupt.*" Property in the custody of the law in other jurisdictions, property held and claimed by others, even if claimed as a preference, and property fraudulently transferred by the bankrupt, must be obtained, if at all, by the trustee for the estate, in an orderly manner by a civil action at law or a plenary suit in equity.

Louisville Trust Co. vs. Comingor, 184 U. S., 18.

Bardes vs. Hawarden Bank, 178 U. S., 524, 534.

Jaquith vs. Rowley, 188 U. S., 620; 47 L. Ed., 622.

Here, as in the Comingor case,

> "The proceeding was purely summary. The determination of the merits on the facts was not open to revision by appeal or writ of error under the bankrupt law. If (petitioners) had been entitled to a trial by jury (they) could not have obtained it as of right. The collection of the amounts found due would be enforceable, not by execution, but by commitment.
>
> "We think that it could not have been the intention of congress thus to deprive parties, claiming property of which they were in possession, of the usual processes of the law in defense of their rights."

Louisville Trust Co. vs. Comingor, *supra.*

Marshall vs. Knox, 16 Wall., 556; 21 L. Ed., 484.

Smith vs. Mason, 14 Wall., 419; 20 L. Ed., 748.

The force of the above quotation of undoubted law from the Comingor case is made manifest by an extract from page 29 of the brief filed by the trustee in this case in the Circuit Court of Appeals. It is there said:

> "By the finding of the referee that the payment was made to Wood & Henderson by Williams, in contemplation of bankruptcy, and within four months of the filing of the petition against him, and that the money was

> paid for services to be rendered in contemplation of bankruptcy, Wood & Henderson are forever precluded from claiming that the money was paid them for any other purpose."

Thus, in a proceeding to which they were strangers, conducted in a foreign jurisdiction, "without due process of law, without a course of legal proceedings according to those rules and forms which have been established for the protection of private rights," by "a determination of the merits on the facts" from which there is no appeal, the petitioners are to be "forever precluded" from that inalienable right of property guaranteed them by the Constitution of the United States. We can not believe that such a course of proceedings can be upheld by this court.

From the record it appears that the Colorado referee undertook to, and did, by summary process, try the title to property not only in possession of Wood & Henderson outside the district, but property which was theirs by every law of the land thirty days before the petition in bankruptcy was filed, and which must remain theirs until they are divested of title in a court of competent jurisdiction by due process of law.

It has been settled law ever since the case of Toland vs. Sprague, 12 Peters (U. S.), 300, that United States courts have no power, in personal actions, to serve the process of subpoena, by which said actions are commenced, outside the district for which the court was created and in which it sits.

We think we have demonstrated that there is no special grant of jurisdiction in the bankruptcy act

which will justify the use made of summary process, and that the first question propounded by the Circuit Court of Appeals should be answered in the negative.

SECOND QUESTION.

> "If a District Court sitting in bankruptcy has this jurisdiction, may it exercise it by means of an order and citation to show cause duly served on the attorney or counsellor outside of the district of the court of bankruptcy, such attorney or counsellor being non-resident of the district in which the proceedings in bankruptcy are pending?"

As has already been stated, a court of bankruptcy is a court of limited and special jurisdiction.

Section 2 of the bankruptcy act limits the territorial jurisdiction of bankruptcy courts to the established geographical boundaries of the courts designated as the courts of bankruptcy. Clause 1 of section 2 still further limits their jurisdiction by excluding them from power to adjudge bankrupt any person who has not had his principal place of business, resided or had his domicile within such territorial limits for the greater portion of the preceding six months.

Thus, while it is true that once the jurisdiction of a bankruptcy court attaches, it has jurisdiction of the *res*, the estate in bankruptcy, yet the law makers were careful to insure *due process of law*, by making certain the jurisdiction over the person in the first

instance. The only exception made is in cases of non-residents of the United States having property within the jurisdiction of the court making the adjudication.

In the case of Bardes vs. Hawarden Bank, this court reaffirmed the doctrine laid down by Mr. Justice Miller in Eyster vs. Gaff, 91 U. S., 521, 525, in the following words:

> "The opinion seems to have been quite prevalent in many quarters at one time, that, the moment a man is declared bankrupt, the District Court, which has so adjudged, draws to itself by that act not only all control of the bankrupt's property and credits, but that no one can litigate with the assignee contested rights in any other court, except in so far as the Circuit Courts have concurrent jurisdiction, and that other courts can proceed no further in suits of which they had at that time full cognizance; and it was a prevalent practice to bring any person who contested with the assignee any matter growing out of disputed rights of property or of contracts, into the bankrupt court by the service of a rule to show cause, and to dispose of their rights in a summary way. This court has steadily set its face against this view. The debtor of a bankrupt, or the man who contests the right to real or personal property with him, loses none of those rights by the bankruptcy of his adversary."

Even if the District Court sitting in bankruptcy has jurisdiction to re-examine such a transaction as took place betwen the bankrupt and petitioners, such jurisdiction must be exercised in an orderly manner and with due regard to practice, form and precedent. A summary proceeding, orders in which may only be enforced by process for contempt, necessarily presupposes clear and unquestioned jurisdiction over the person affected by the proceeding; and where, as here, the persons affected are not in any manner parties to the proceeding, have never in any way appeared therein and are non-residents of the district in which the court sits, summary process fails and resort must be had to a civil action at law or a plenary suit in equity.

It is no answer to say that if the court has jurisdiction to re-examine, that is, jurisdiction of the subject-matter, it has jurisdiction to reach beyond its territorial limits and bring in, by the mere service of notice, parties who could not be brought in by process of subpoena in a plenary suit. Jurisdiction of the subject-matter does not give jurisdiction of the person—else the distinction between actions local and transitory would long since have disappeared.

In Jaquith vs. Rowley, 188 U. S., 620, 47 L. Ed., 622, this court say:

> "The proceeding was a summary application to the court in bankruptcy to grant an order in a matter, the result of the granting of which would be to immediately take from the surety moneys which had been deposited with him before the proceedings in

bankruptcy, and thus compel him to come into the bankruptcy court for the litigation of questions as to his right to retain the money claimed by him. To extend such a jurisdiction over an adverse claimant would be within the prohibition of section 23, a and b, whether such jurisdiction were exerted by an action strictly so called or by a summary application to the court in bankruptcy. *It is the exercise of jurisdiction which the section prohibits, and the particular method of procedure in the court is immaterial.* * * * It is not necessary, in order to be an adverse claimant, that the surety should claim to be the absolute owner of the property in his possession. It is sufficient, if, as in the present case, the money was deposited with him to indemnify him for his liability upon the bail bond, and that liability had not been determined and satisfied. *If the trustee desires to test the question of the right of the surety to retain the money, he must do so in accordance with the provisions of the section of the bankrupt law above referred to.*"

It appears, from the certificate, that the property "*was transferred*" before the petition in bankruptcy was filed, and such transfer makes adverse claimants of the petitioners under the ruling in Jaquith vs. Rowley, *supra,* and if the trustee desires to test their rights, he must do so in accordance with the provisions of section 23. The rule has not been changed by the amendatory act of 1903. If the case made

falls within section 60 b or 67 e, the bankruptcy court has jurisdiction of the subject-matter; if it falls under section 70 e, the case of Bardes vs. Hawarden Bank controls; in any event, the process of subpœna or summons must be regularly served.

In Jaquith vs. Rowley and in Louisville vs. Comingor the fund in question was within the territorial confines of the bankruptcy court, and personal service of the citation was had upon the persons affected within and not without the district, and in both those cases jurisdiction by summary process was denied. In the case here presented the property in question *"was transferred"* outside the district, before the petition in bankruptcy was filed, and neither it nor Wood & Henderson, who claim it adversely, have ever been within the district. Even if jurisdiction to re-examine this particular transaction under section 60 d was conceded as to the subject-matter, we think, under the authorities, the exercise of such jurisdiction by service of a mere order and citation to show cause outside the district must be denied.

III.

THIRD QUESTION.

> "May a plenary suit instituted by the trustee in bankruptcy against such attorney or counsellor in the District Court, where the estate in bankruptcy is being administered, be maintained upon service of process upon the attorney or counsellor, who is a non-resident of the district, outside of that district?"

Again we direct attention to the fact that it is now settled that the words "herein otherwise provided," in subdivision 7, of section 2, of the bankruptcy act, refer to section 23 of the act.

> "The general scope and object of which, as indicated by its title, are to define the 'Jurisdiction of United States and State Courts' in the premises."

In Bardes vs. Hawarden Bank, 178 U. S., 524, this court say:

> "Congress, by the second clause of section 23 of the present bankrupt act, appears to this court to have clearly manifested its intention that controversies, not strictly or properly part of the proceedings in bankruptcy, but independent suits brought by the trustee in bankruptcy to assert a title to money or property as assets of the bankrupt against strangers to those proceedings, should not come within the jurisdiction of the District Courts of the United States, 'unless by consent of the proposed defendant.'"
>
> "This limitation is general in its terms embracing all suits. Congress, by the amendment of 1903, excepted from this limitation certain suits which may now be brought in the bankruptcy courts without the consent of the defendant. The suits excepted are 'suits for the recovery of property, under section 60, sub-division b, and section 67, sub-division e.' The statute re-

quiring 'the consent of the proposed defendant' stands as enacted, with no other exception than the one named."

Hull vs. Burr, 18 Am. R. R., 541, 547; 153 Fed., 945.

Gregory vs. Atkinson, 127 Fed., 183, 185.

Prior to the amendment of 1903 a plenary suit by the trustee against Wood & Henderson in the District Court for the District of Colorado would have been impossible *without consent,* under the decision in Bardes vs. Bank; and it is equally impossible now, unless such suit clearly falls within one of the *two* classes, concerning which the jurisdiction of courts of bankruptcy has been enlarged by the amendment.

Clearly such a suit would not be a suit to avoid a preference under section 60, sub-division b; neither could it be considered an action to recover property transferred with intent to hinder, delay or defraud creditors under section 67, subdivision e. Rather would it be an action by the trustee to avoid a transfer by the bankrupt, which might have been avoided by any creditor had not bankruptcy intervened, and falling within the provisions of section 70 e.

The amendatory act as passed by congress leaves suits under section 70, subdivision e, still subject to the original limitation of section 23, subdivision b.

"Construing section 70 e (as amended) in connection with section 23 b, it appears that the former conferred jurisdiction on courts of bankruptcy of suits to avoid trans-

fers of his property made by the bankrupt which any creditor of the bankrupt might have avoided, but that, although jurisdiction of the subject-matter is conferred, it can only be exercised over the persons of the defendants by their consent."

Hull vs. Burr, 153 Fed., 945.

Gregory vs. Atkinson, 127 Fed., 183, 185.

Assuming that the *Third Question* is based upon the facts set forth in the *First Question,* we are led at once to the inquiry—"Would such a suit fall within the provisions of section 60, subdivision b, or section 67, subdivision e?" If not, then it is clearly precluded by the decision in *Bardes vs. Hawarden Bank.*

A preferred creditor is defined by section 60, in effect and almost in words, to be *a person who has received from the bankrupt a transfer of property which will enable him to obtain a greater percentage of his debt than any other creditor of the same class.* This presupposes the existence of the relation of debtor and creditor, is not compatible with the facts set forth in the record and in the First Question, for it there appears, that the property *"was transferred* for services to be rendered," and, therefore, that there was no antecedent consideration implying the pre-existence of the relation of debtor and creditor. The conclusion, then, that such a suit would not fall within section 60, subdivision b, seems to be inevitable. Manifestly the record does not disclose a state of facts showing a transfer with intent to hinder, delay or defraud creditors, and the pursuit of a remedy under section 67 e is not open to the trustee.

We believe that, under the authorities, the answer to Question Three must be: *Not unless the case made comes clearly within the provisions of either section 60 b or section 67 e.*

Under the facts here presented it appears that the bankrupt *transferred* certain property to Wood & Henderson thirty days before a petition was filed against him in bankruptcy, at a time when, so far as the parties to the transaction were concerned, his right of property was absolute and the title he gave good.

If Wood & Henderson were then creditors, and were thereby preferred; if there was an intent to hinder, delay or defraud creditors, or if the transfer was fraudulent as to creditors of the bankrupt, the bankruptcy act affords a remedy.

The mere fact that Wood & Henderson happen to be attorneys at law by profession does not give a court of bankruptcy, before which they have never appeared, and of which they are not officers, in an action to which they are not parties, the right to summarily deal with property in their possession, title to which rested in them absolutely, until divested by a court of competent jurisdiction, in an action regularly instituted, and after "a course of legal proceedings according to those rules and forms which have been established for the protection of private rights."

To characterize the proceedings before the referee as inquisitorial would be drawing it mildly.

No more arbitrary or tyrannical method of procedure than that pursued here can well be imagined; no clearer example of the violation of a constitutional right by the confiscation of private property, without due process of law, can be found in the books, and if

the determination of the referee is to be allowed to stand, the sanctity of judicial precedent and tradition must be violated, the spirit and intent must be sacrificed to technical expression, and American jurisprudence will rest upon a new and hitherto unknown basic principle.

Respectfully submitted,

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